

Todd M. Friedman (SBN 216752)  
Adrian R. Bacon (SBN 280332)  
LAW OFFICES OF TODD M. FRIEDMAN, P.C.  
21550 Oxnard St., Suite 780  
Woodland Hills, CA 91367  
Phone: 323-306-4234  
Fax: 866-633-0228  
[tfriedman@toddflaw.com](mailto:tfriedman@toddflaw.com)  
[abacon@toddflaw.com](mailto:abacon@toddflaw.com)  
*Attorneys for Plaintiff*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

SIDNEY NAIMAN, individually and ) Case No.  
on behalf of all others similarly situated,)

Plaintiff,

vs.

MERCHANTS BANCARD )  
NETWORK, INC. and DOES 1 through )  
10, inclusive, and each of them, )  
Defendant. )

**CLASS ACTION**

**COMPLAINT FOR VIOLATIONS  
OF:**

1. NEGLIGENT VIOLATIONS  
OF THE TELEPHONE  
CONSUMER PROTECTION  
ACT [47 U.S.C. §227(b)]
2. WILLFUL VIOLATIONS  
OF THE TELEPHONE  
CONSUMER PROTECTION  
ACT [47 U.S.C. §227(b)]

**DEMAND FOR JURY TRIAL**

Plaintiff SIDNEY NAIMAN (“Plaintiff”), individually and on behalf of all  
others similarly situated, alleges the following upon information and belief based  
upon personal knowledge:

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1 **NATURE OF THE CASE**

2 1. Plaintiff brings this action individually and on behalf of all others  
3 similarly situated seeking damages and any other available legal or equitable  
4 remedies resulting from the illegal actions of MERCHANTS BANCARD  
5 NETWORK, INC. (“Defendant”), in negligently, knowingly, and/or willfully  
6 contacting Plaintiff on Plaintiff’s cellular telephone in violation of the Telephone  
7 Consumer Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”) and related  
8 regulations.

9 **JURISDICTION & VENUE**

10 2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff,  
11 a California corporation with its principle place of business also in California, seeks  
12 relief on behalf of a Class, which will result in at least one class member belonging  
13 to a different state than that of Defendant, a Florida Company. Plaintiff also seeks  
14 up to \$1,500.00 in damages for each call; in violation of the TCPA, which, when  
15 aggregated among a proposed class in the thousands, exceeds the \$5,000,000.00  
16 threshold for federal court jurisdiction. Therefore, both diversity jurisdiction and  
17 the damages threshold under the Class Action Fairness Act of 2005 (“CAFA”) are  
18 present, and this Court has jurisdiction.

19 3. Venue is proper in the United States District Court for the Northern  
20 District of California pursuant to 28 U.S.C. § 1391(b)(2) because Defendant do  
21 business within the State of California and Plaintiff resides within the State.

22 **PARTIES**

23 4. Plaintiff, SIDNEY NAIMAN (“Plaintiff”), is a resident of California  
24 and is a “person” as defined by 47 U.S.C. § 153 (39).

25 5. Defendant, MERCHANTS BANCARD NETWORK, INC.  
26 (“Defendant”) is a credit card company and is a “person” as defined by 47 U.S.C.  
27 § 153 (39).

28 6. The above-named Defendant, and their subsidiaries and agents, are

collectively referred to as “Defendant.” The true names and capacities of the Defendant sued herein as DOE DEFENDANTS 1 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues such Defendants by fictitious names. Each of the Defendant designated herein as a DOE is legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the Complaint to reflect the true names and capacities of the DOE Defendants when such identities become known.

7. Plaintiff is informed and believes that at all relevant times, each and every Defendant was acting as an agent and/or employee of each of the other Defendants and was acting within the course and scope of said agency and/or employment with the full knowledge and consent of each of the other Defendant. Plaintiff is informed and believes that each of the acts and/or omissions complained of herein was made known to, and ratified by, each of the other Defendant.

### **FACTUAL ALLEGATIONS**

1. Beginning in or around October 2017, Defendant contacted Plaintiff on Plaintiff’s cellular telephone number ending in -5502, in an attempt to solicit Plaintiff to purchase Defendant’s services.

2. Defendant used an “automatic telephone dialing system” as defined by 47 U.S.C. § 227(a)(1) to place its call to Plaintiff seeking to solicit its services.

3. Defendant contacted or attempted to contact Plaintiff from telephone number (407)278-4614 confirmed to be Defendant’s number

4. Defendant’s call constituted call that was not for emergency purposes as defined by 47 U.S.C. § 227(b)(1)(A).

5. Defendant’s call was placed to telephone number assigned to a cellular telephone service for which Plaintiff incurs a charge for incoming call pursuant to 47 U.S.C. § 227(b)(1).

6. During all relevant times, Defendant did not possess Plaintiff’s “prior

1 express consent” to receive call using an automatic telephone dialing system or an  
 2 artificial or prerecorded voice on its cellular telephones pursuant to 47 U.S.C. §  
 3 227(b)(1)(A).

4 7. Such call constitutes solicitation call pursuant to 47 C.F.R. §  
 5 64.1200(c)(2) as they were attempts to promote or sell Defendant’ services.

6 8. Plaintiff never granted Defendant any prior express consent nor was  
 7 any established business relationship with Defendant in existence as defined under  
 8 16 C.F.R. 310.4(b)(1)(iii)(B).

9 9. Upon information and belief and based on Plaintiff’s experiences of  
 10 being called by Defendant after requesting they stop calling, and at all relevant  
 11 times, Defendant failed to establish and implement reasonable practices and  
 12 procedures to effectively prevent telephone solicitations in violation of the  
 13 regulations prescribed under 47 U.S.C. § 227(c)(5).

### 14 CLASS ALLEGATIONS

15  
 16 10. Plaintiff brings this action individually and on behalf of all others  
 17 similarly situated, as a member the four proposed classes (hereafter, jointly, “The  
 18 Classes”). The class concerning the ATDS claim for no prior express consent  
 19 (hereafter “The ATDS Class”) is defined as follows:

20 All persons within the United States who received any  
 21 solicitation/telemarketing telephone call from Defendant  
 22 to said person’s cellular telephone made through the use  
 23 of any automatic telephone dialing system or an artificial  
 24 or prerecorded voice and such person had not previously  
 25 consented to receiving such call within the four years  
 prior to the filing of this Complaint.

26 11. Plaintiff represents, and are a member of, The ATDS Class, consisting  
 27 of all persons within the United States who received any collection telephone calls  
 28 from Defendants to said person’s cellular telephone made through the use of any

1 automatic telephone dialing system or an artificial or prerecorded voice and such  
2 person had not previously not provided their cellular telephone number to  
3 Defendants within the four years prior to the filing of this Complaint.

4 12. Defendants its employees and agents are excluded from The Class.  
5 Plaintiff do not know the number of members in The Class, but believes the Class  
6 members number in the thousands, if not more. Thus, this matter should be  
7 certified as a Class Action to assist in the expeditious litigation of the matter.

8 13. The Class is so numerous that the individual joinder of all of its  
9 members is impractical. While the exact number and identities of The Class  
10 members are unknown to Plaintiff at this time and can only be ascertained through  
11 appropriate discovery, Plaintiff is informed and believe and thereon allege that The  
12 Class includes thousands of members. Plaintiff allege that The Class members may  
13 be ascertained by the records maintained by Defendant.

14 14. Plaintiff and members of The ATDS Class were harmed by the acts  
15 of Defendants in at least the following ways: Defendants illegally contacted  
16 Plaintiff and ATDS Class members via their cellular telephones thereby causing  
17 Plaintiff and ATDS Class members to incur certain charges or reduced telephone  
18 time for which Plaintiff and ATDS Class members had previously paid by having  
19 to retrieve or administer messages left by Defendants during those illegal calls, and  
20 invading the privacy of said Plaintiff and ATDS Class members.

21 15. Common questions of fact and law exist as to all members of The  
22 ATDS Class which predominate over any questions affecting only individual  
23 members of The ATDS Class. These common legal and factual questions, which  
24 do not vary between ATDS Class members, and which may be determined without  
25 reference to the individual circumstances of any ATDS Class members, include,  
26 but are not limited to, the following:

- 27 a. Whether, within the four years prior to the filing of this  
28 Complaint, Defendants made any telemarketing/solicitation

1 call (other than a call made for emergency purposes or made  
2 with the prior express consent of the called party) to a ATDS  
3 Class member using any automatic telephone dialing system or  
4 any artificial or prerecorded voice to any telephone number  
5 assigned to a cellular telephone service;

6 b. Whether Plaintiff and the ATDS Class members were damaged  
7 thereby, and the extent of damages for such violation; and

8 c. Whether Defendants should be enjoined from engaging in such  
9 conduct in the future.

10 16. As a person that received numerous telemarketing/solicitation calls  
11 from Defendants using an automatic telephone dialing system or an artificial or  
12 prerecorded voice, without Plaintiff's prior express consent, Plaintiff is asserting  
13 claims that are typical of The ATDS Class.

14 17. Plaintiff will fairly and adequately protect the interests of the members  
15 of The Class. Plaintiff has retained attorneys experienced in the prosecution of  
16 class actions.

17 18. A class action is superior to other available methods of fair and  
18 efficient adjudication of this controversy, since individual litigation of the claims  
19 of all Class members is impracticable. Even if every Class member could afford  
20 individual litigation, the court system could not. It would be unduly burdensome  
21 to the courts in which individual litigation of numerous issues would proceed.  
22 Individualized litigation would also present the potential for varying, inconsistent,  
23 or contradictory judgments and would magnify the delay and expense to all parties  
24 and to the court system resulting from multiple trials of the same complex factual  
25 issues. By contrast, the conduct of this action as a class action presents fewer  
26 management difficulties, conserves the resources of the parties and of the court  
27 system, and protects the rights of each Class member.

28 19. The prosecution of separate actions by individual Class members

1 would create a risk of adjudications with respect to them that would, as a practical  
2 matter, be dispositive of the interests of the other Class members not parties to such  
3 adjudications or that would substantially impair or impede the ability of such non-  
4 party Class members to protect their interests.

5 20. Defendants have acted or refused to act in respect generally applicable  
6 to The Class, thereby making appropriate final and injunctive relief with regard to  
7 the members of the Class as a whole.

8  
9 **FIRST CAUSE OF ACTION**

10 **Negligent Violations of the Telephone Consumer Protection Act**

11 **47 U.S.C. §227(b).**

12 21. Plaintiff repeats and incorporates by reference into this cause of action  
13 the allegations set forth in the paragraphs above.

14 22. The foregoing acts and omissions of Defendant constitute numerous  
15 and multiple negligent violations of the TCPA, including but not limited to each  
16 and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular  
17 *47 U.S.C. § 227 (b)(1)(A)*.

18 23. As a result of Defendant' negligent violations of *47 U.S.C. § 227(b)*,  
19 Plaintiff and the Class Members are entitled an award of \$500.00 in statutory  
20 damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)*.

21 24. Plaintiff and the ATDS Class are also entitled to and seek injunctive  
22 relief prohibiting such conduct in the future.

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24  
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**SECOND CAUSE OF ACTION**

**Knowing and/or Willful Violations of the Telephone Consumer Protection Act**

**47 U.S.C. §227(b)**

**On Behalf of the ATDS Class**

25. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth in the paragraphs above.

26. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular *47 U.S.C. § 227 (b)(1)(A)*.

27. As a result of Defendant' knowing and/or willful violations of *47 U.S.C. § 227(b)*, Plaintiff and the ATDS Class are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)* and *47 U.S.C. § 227(b)(3)(C)*.

28. Plaintiff and the Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff requests judgment against Defendant for the following:

**FIRST CAUSE OF ACTION**

**Negligent Violations of the Telephone Consumer Protection Act**

**47 U.S.C. §227(b)**

- As a result of Defendant' negligent violations of *47 U.S.C. §227(b)(1)*, Plaintiff and the ATDS Class members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to *47 U.S.C. 227(b)(3)(B)*.



- Any and all other relief that the Court deems just and proper.

## **SECOND CAUSE OF ACTION**

### **Knowing and/or Willful Violations of the Telephone Consumer Protection Act**

#### **47 U.S.C. §227(b)**

- As a result of Defendant' willful and/or knowing violations of 47 U.S.C. §227(b)(1), Plaintiff and the ATDS Class members are entitled to and request treble damages, as provided by statute, up to \$1,500, for each and every violation, pursuant to 47 U.S.C. §227(b)(3)(B) and 47 U.S.C. §227(b)(3)(C).
- Any and all other relief that the Court deems just and proper.

## **JURY DEMAND**

29. Pursuant to the Seventh Amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Respectfully Submitted this 26th Day of May, 2020.

LAW OFFICES OF TODD M. FRIEDMAN, P.C.

By: /s/ Todd M. Friedman  
Todd M. Friedman  
Law Offices of Todd M. Friedman  
Attorney for Plaintiff